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IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in failing to vacate the disqualified district judge's findings of facts and conclusions of law for his repeated and flagrant violations of the Code of Conduct of United States Judges and 28 U.S.C. § 455(a).

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INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes a substantial portion of its resources to defending and promoting the free enterprise system, individual rights, and a limited and accountable government. In particular, WLF has devoted substantial resources to promoting ethical conduct by lawyers and the judiciary. For example, WLF's SCALES Project ("Stop the Collapse of America's Legal Ethics") is a multi-state effort of petitioning all the state bar authorities to amend their rules governing the ethical conduct of attorneys. The subjects of the petitions include opening up the disciplinary process to the public, limiting campaign contributions from attorneys to judicial candidates and judges, and stemming the abuses of charging clients excessive contingency fees.

WLF also has a strong and abiding interest in combatting judicial misconduct and maintaining the public's confidence in the integrity of the judiciary. Over the years, WLF has filed scores of judicial misconduct complaints against federal and state judges with the appropriate judicial disciplinary panels for violations of the relevant codes of judicial conduct. WLF's judicial misconduct complaints have been directed against judges who have engaged in unethical conduct such as *ex parte* contacts, improper statements both on and off the bench, and other conduct which undermines the integrity and impartiality of the judiciary. *See, e.g., In re School*

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici and their counsel, contributed monetarily to the preparation and submission of this brief.

Asbestos Litigation, 977 F.2d 764, 777 n. 10 (referring to WLF's judicial misconduct complaint filed under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c), with the Judicial Council of the Third Circuit).

Unfortunately, it is has been WLF's experience that filing judicial misconduct complaints has not resulted in meaningful review of the underlying misconduct charges. All too often, the various disciplinary boards and judicial councils have been quick to dismiss the complaints without any investigation and without providing any reasons. The public perceives, rightly or wrongly, that charges of misconduct will not be taken seriously. WLF testified to that effect in hearings before the National Commission on Judicial Discipline and Removal on May 1, 1992, and supported measures that would make disciplinary procedures more effective.

WLF has also appeared as amicus curiae in this Court and lower courts in cases that involved issues of judicial misconduct. *See, e.g., United States v. Nixon*, 506 U.S. 224 (1993); *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371 (D.D.C. 1984); *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of law and public policy, and has appeared as co-amicus with WLF in this Court on a number of occasions, including *United States v. Nixon*.

Amici curiae submit that the flagrant and egregious violations of the Code of Judicial Conduct by the district judge in conducting secret and embargoed interviews with the press to seek publicity and vent his views of the case and the parties, warrant a full vacatur of the trial court's findings of fact and conclusions of law. Such a remedy would be commensurate with the gross ethical violations that occurred in this case, and would more fully restore the public's confidence in the integrity and impartiality of the judiciary.

At a minimum, this Court should review this case to ensure that the court of appeals' exercise of its discretion was fully informed by summarily remanding for further factfinding and reconsideration of the actual bias issue. Such reconsideration is imperative because the purported lack of actual bias was highly relevant to the court of appeals' decision to impose only a limited disqualification of the district judge at the remedy stage of the proceeding. Only by developing a full record will the public be assured that the judiciary has taken all reasonable steps to determine the extent of the district judge's ethical breaches in this highly visible case, and to fashion an appropriate remedy based on all the facts.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

In the interests of judicial economy, amici adopt by reference the Statement of the Case as presented by Microsoft in its petition.

In brief, the District Judge in this case committed flagrant and repeated violations of the Code of Conduct for United States Judges when he held a number of secret press interviews in his Chambers about the underlying antitrust case against Microsoft while the case was pending before him. *United States v. Microsoft*, 253 F.3d 34, 108-116 (D.C. Cir. 2001). The Judge "embargoed" his interviews until the case was completed, thereby precluding Microsoft from seeking immediate disqualification under 28 U.S.C. § 455.[2]

While these violations were egregious enough, they were compounded by what the Judge had to say to the reporters regarding the case, Bill Gates, and Microsoft. For example, the Judge compared the conduct of Bill Gates and other officers of Microsoft to drug traffickers and gangland killers. 253 F.3d at 110. He also expressed personal animus against Bill Gates, referring to him as having a "Napoleonic" personality who appeared to the Judge as a "smart-mouthed young kid" in an early photograph, and who needed some "discipline" and reversals in his life. *Id.*

The court of appeals held that the violations "seriously tainted the proceedings before the District Court and called into question the integrity of the judicial process." 253 F.3d at 46. Yet the court of appeals left intact in their entirety the Judge's Findings of Fact and Conclusions of Law. The court, finding no actual bias, only vacated the

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[2] For an excellent discussion of the ethical considerations of the Judge's *ex parte* discussions with reporters about the Microsoft case, see Ronald D. Rotunda, *Judicial Comments on Pending Cases: The Ethical Restrictions and the Sanctions - A Case Study of the Microsoft Litigation*, 2001 U. ILL. L.REV. 611 (2001).

remedy fashioned by the Judge (which had been vacated for three other grounds) and remanded the case to a new judge to conduct further proceedings in the case. No factfinding was ordered in order to determine the full extent of the Judge's ethical breaches and the content of his *ex parte* statements.

REASONS FOR GRANTING THE PETITION

Microsoft presents three compelling reasons why the petition for writ of certiorari should be granted. First, the court of appeals decision conflicts with decisions of this Court and other circuits; second, the failure to vacate the findings of fact and conclusions of law was erroneous; and third, review is important to restoring the public's confidence in the integrity of the judicial system. Pet. 14-27. While amici agree with all three of these reasons, amici's brief will primarily focus on the second and third reasons, paying particular attention to the court of appeals' failure to properly assess the district judge's derogatory statements that not only called into question the court's apparent impartiality, but provided evidence of actual bias.

As an initial matter, amici suggest that there is a fourth compelling reason why the petition should be granted: this Court should exercise its supervisory powers over the lower courts under Sup. Ct. R. 10. *See* Robert L. Stern et al., *Supreme Court Practice* 299 (5th ed. 1979) (the Court may grant review if the Justices "believe that proper supervision of the federal judiciary demands that the lower court be set aright").

The circumstances under which federal judges should be disqualified from hearing cases, and the appropriate remedy for their failing to do so, clearly fall within this

Court's supervisory powers. *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 n.21 (1987) (the Court's exercise of supervisory authority is "especially appropriate" in an area that "concerns the functioning of the Judiciary"); *id.* ("we have not hesitated to find actual prejudice irrelevant when utilizing supervisory authority."). *See Calvaresi v. United States*, 348 U.S. 961 (1955) (granting certiorari "[i]n the interests of justice and in the exercise of the supervisory powers of this Court," and summarily "revers[ing] and remand[ing] to the District Court for retrial before a different judge" in a case where the court of appeals failed to disqualify the judge for alleged bias).

This additional reason justifying review is interrelated with the other three reasons. For what is at stake in this case is not just the proper interpretation of an important statute, but the proper functioning of the federal Judiciary -- one of three branches of our government -- and the public's confidence in it.

THE CASE PRESENTS AN IMPORTANT QUESTION OF THE HIGHEST ORDER REGARDING THE PUBLIC'S CONFIDENCE IN THE INTEGRITY AND IMPARTIALITY OF THE JUDICIAL PROCESS

The right to trial by an impartial judge "is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Id.* at 136 (citation omitted). "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty*

Co., 393 U.S. 145 (1968). The proper functioning of the judiciary and the public's confidence in the integrity and impartiality of the judicial process demand that these high standards be maintained.

In enacting 28 U.S.C. § 455 in 1974, Congress clearly recognized these fundamental precepts and intended to "broaden and clarify the grounds for judicial disqualification" that then existed, and to conform them with the recently adopted ABA Code of Judicial Conduct, Canon 3C. H.R. Rep. No. 93-1453, p.1, U.S. Code Cong. & Admin.News 1974, p. 6351. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859 n.7 (1988). Section 455(a) requires disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned." Section 455(b)(1) further provides in pertinent part that a judge shall disqualify himself "where he has a personal bias or prejudice concerning a party...."

It is undisputed that the trial court's flagrant violations of the Code of Judicial Conduct brought into question the judge's impartiality, and hence, the judge was automatically disqualified under the statute. But as will be discussed *infra*, the evidence of actual bias by the judge not only triggered disqualification under § 455(b)(1), but provided additional evidence to a make out an aggravated violation under § 455(a). *See, e.g., United States v. Holland*, 655 F.2d 44, 47 (5th Cir. 1981) (trial judge's remarks, even though made outside the presence of the jury, constituted both actual bias under § 455(b)(1) and called into question judge's impartiality under § 455(a)). In other words, evidence of actual bias clearly raises the question (if not answers it) of the judge's impartiality under § 455(a); accordingly, such aggravating

circumstances should have been part of the calculus used by the court in fashioning an appropriate remedy.

The question, therefore, is whether the limited retroactive disqualification ordered by the court of appeals does justice in this case where egregious ethical violations were treated as if they were a single or minor violation of § 455(a), and where the court of appeals turned a blind eye to evidence of actual bias by the district judge.

A. The District Judge's Derogatory Comments Regarding Bill Gates and Microsoft Evidence Actual Bias or Prejudice

The derogatory comments regarding Bill Gates and Microsoft made by the district judge to the reporters during the case were serious and flagrant violations of the Code of Judicial Conduct. They did more than simply call into question the judge's impartiality or give an appearance of impartiality. The statements brimmed with evidence of actual bias or prejudice on the part of the judge against Bill Gates and his company. As Microsoft correctly noted, the "judge's derogatory comments about Microsoft, his comparison of company officers to drug dealers and his statement that Microsoft was not entitled to any 'due process' all suggest a profound personal animus." Pet. 16 n.6.

In addition to the specific offending comments identified by Microsoft, amici submit that other public comments by the district judge further demonstrate the

presence of actual bias or prejudice.[3] For example, according to Ken Auletta (who was one of the reporters), the judge told him that he believed that Gates had a "'Napoleonic concept of himself and his company, an arrogance that derives from power and unalloyed success, with no leavening hard experience, no reverses.'" 253 F.3d at 110. The Judge became

> "*increasingly* troubled by *what he learned about Bill Gates* and *couldn't get out of his mind the group picture he had seen of Bill Gates* and Paul Allen and their shaggy-haired first employees at Microsoft." The reporter wrote that the Judge said *he saw in the picture "a smart-mouthed young kid who has extraordinary ability and needs a little discipline.* I've *often said to colleagues* that Gates would be better off if he had finished Harvard."[4]

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[3] This Court should keep in mind that the court of appeals only examined the district judge's reported statements, admitting that it had no idea of the full extent of the statements made by the judge to the reporters. 253 F.3d at 113. Certainly, a media-savvy judge such as the one in this case who knows how to "embargo" his comments certainly knows how to speak to reporters "off the record."

[4] Not only did the district judge repeatedly violate the Code of Judicial Conduct by discussing his views about the case with reporters, the judge by his own admission "often" spoke to his colleagues about Bill Gates' poor decision to drop out of Harvard (where the judge attended law school). Presumably, the judge did not soliloquize, but made this particular critical observation as part of a conversation with his colleagues about Bill Gates. By doing so, the Judge apparently violated the Code of Judicial Conduct, Canon 3A(4) which permits a limited exception to the prohibition against the strict rule against *ex parte* contacts by allowing a judge to "consult[] with other judges, or with court personnel whose function is to aid the judge in carrying out adjudicative responsbilities." Commentary

Id. (emphasis added).

In the first place, the group photograph of a young Bill Gates and his shaggy-haired employees was not submitted as evidence in the case. The judge likely may have seen the group photograph during the pendency of the case, at a time when he became "*increasingly* troubled by what he learned about Bill Gates." It thus appears that the Judge was actively involved in the process of obtaining extrajudicial biographical and other information about Bill Gates during the proceedings, including learning how Bill Gates allegedly had "no leavening hard experiences, no reverses" in his life, and forming a critical opinion of Gates for dropping out of Harvard. None of this information, to amici's knowledge, was evidence in the antitrust case.[5]

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to Canon 3A(3). The Judge was clearly not "consulting" with other judges to aid him in carrying out his adjudicative responsbilities; rather, he was criticizing Bill Gates about his schooling and career decisions. Because the court of appeals did not remand for factfinding of the trial judge's misconduct, the public can only speculate as to who the "colleagues" are with whom the Judge discussed Bill Gates or the case, and what further comments were made by the Judge. For all the public knows, the "colleagues" could have included one or more members of the court of appeals who share common work and dining facilities with the district judge.

[5] The United States is thus clearly wrong when it states in its Opposition that "the misconduct here did not implicate any pre-existing basis for doubting the judge's impartiality, but arose from the judge's reaction to the evidence presented in the case itself." U.S. Opp. at 18, n.8. These derogatory views of Bill Gates are not the kind of permissible judicial bias that is "based solely on witness testimony and evidence adduced at trial" as the United States claims. U.S. Opp. 22 n.11, citing *Liteky v. United States*, 510 U.S. 540, 555 (1994). Rather, these statements reflect personal bias or prejudice

Secondly, these statements clearly reflect a bias or prejudice against Bill Gates and his company.[6] It is reasonable to conclude from these press accounts that the Judge was clearly preoccupied and obsessed with the photograph ("couldn't get out of his mind") of the "smart-mouthed young kid" with a "Napoleonic" complex who needed "a little discipline" because he had "no reverses" in his life. The ineluctable conclusion from these statements is that the judge was intent on acting on his bias by putting that "smart-mouthed kid" in his place by giving him a "leavening hard experience," or setback in his life, in the only way the judge could: by ruling against Gates and his company in the case.

If these derogatory statements do not evidence actual bias or prejudice, it is hard to imagine what would. Microsoft is thus quite correct in stating that the public will conclude that the district judge has "'prejudged the merits of the controversy or is biased against. . . one of the parties.'" Pet. 26, citing *Broadman v. Comm'n on Judicial Performance*, 959 P.2d 715, 727 (Cal. 1998), *cert. denied*, 525 U.S. 1070 (1999).

Clearly, these denigrating statements would not be immune from the strictures of the Code of Judicial Conduct or § 455 if they were made by the Judge as part of his Findings of Facts or Conclusions of Law. Astonishingly, the court of appeals seriously misconstrued

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derived from extrajudicial sources.

[6] *Cf.* Commentary to Canon 3A(3) (a judge has a duty "to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias towards another on the basis of personal characteristics. . . .").

the Code of Judicial Conduct and this Court's decision in *Liteky* when it declared that the trial judge's "crude characterizations of Microsoft, his frequent denigrations of Bill Gates, his mule trainer analogy as a reason for his remedy -- *all of these remarks and others* might not have given rise to violation of the Canons or of section 455(a) had he uttered them from the bench." 253 F.3d at 115 (emphasis added).

Amici submit that the derogatory comments made by the Judge to the press have no place in our judicial system whether uttered on or off the bench. *See Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992) (judge's critical views of the tobacco industry expressed in court's ruling disqualifies the trial judge). As this Court stated in *Liteky*, while critical remarks of counsel, the parties, or the case by the judge during the trial ordinarily do not support a bias or partiality challenge, "[t]hey *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* at 1157. In this case, both situations were present.

Amici submit that members of the public are equally dismayed and puzzled by the court of appeals' assurances that while the "actions of the trial judge seriously tainted the proceedings before the District Court and called into question the integrity of the judicial process," it could find "no evidence of actual bias." 253 F.3d at 46. This negative finding strains credulity. To paraphrase this Court's observation in *Liljeberg*, "A finding by [the court of appeals] -- faced with the difficult task of passing upon the integrity of a fellow member of the bench -- that his or her colleague merely possessed [an appearance of bias]

and not *actual* [bias], is unlikely to significantly quell the concerns of the skeptic." *Id.* at 865 n.12.

Undoubtedly, there was at least *some* evidence of actual bias. On the one hand, we are told by the court of appeals that the trial judge's comments "seriously tainted the proceedings," but on the other hand, we are supposed to be assured that a review of the record shows no basis "to suppose that actual bias infected his factual findings." 253 F.3d at 117. But this latter finding was a foregone conclusion by the court. If in fact there had been "no evidence of actual bias" manifested by the judge's derogatory statements about Microsoft and Bill Gates, it woud have been superfluous for the court to make the further determination as to whether any non-existent actual bias "infected [the judge's] factual findings."

But if, on the other hand, we are to understand the court of appeals as concluding that the presence of actual bias can be gleaned *only* from examining the four corners of the court's factual findings, the court of appeals' crabbed view of whether actual bias exists or not deserves this Court's review and reversal. Correction of that serious error is warranted because it undermines the public confidence in the integrity of the judicial process. For according to the court of appeals' reasoning, judges would be free to adjudicate cases where they harbor actual bias or prejudice, and perhaps even express it, as long as they were careful to sanitize their factual findings to eliminate any trace of that bias.

B. The Court of Appeals' Failure to Require Full Disqualification Was Erroneous and Undermined The Public's Confidence in the Judiciary

To be sure, this Court in *Liljeberg* noted that "Congress has wisely delegated to the judiciary the task of fashioning the remedies that will *best serve* the purpose of the legislation." *Id.* at 862 (emphasis added). The *Liljeberg* Court required lower courts to consider three factors in fashioning a disqualification remedy: "[1] the risk of injustice to the parties in the particular case, [2] the risk that denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Id.* at 863.

While the court of appeals purported to apply these three factors in the case before it, the court's application of the factors raises serious questions deserving this Court's review. In the first place, the court of appeals gave short shrift to the last factor, namely, "the risk of undermining the public's confidence in the judicial process." The court of appeals simply made the conclusory and unadorned statement that its partial retroactive disqualification "minimizes the risk of injustice to the parties and the damage to public confidence in the judicial process." 253 F.3d at 116. After all, the public's confidence in the judicial process is the very purpose that Congress had in mind when it enacted § 455. The court utterly failed to explain *how* this partial diqualification minimizes the risk of damage to public confidence in the judicial process.

Rather than minimizing the risk of damage to public confidence, amici submit that the partial retroactive

disqualification serves to further erode the public confidence in the judicial process. The public is left with the spectacle that the egregious and repeated violations of the Code of Judicial Conduct in conducting secret interviews with the press during the pendency of a major antitrust case will merit nothing more than a reassignment of the case to a new judge to fashion a remedy where the original remedy by the disqualified judge had already been vacated on three other grounds. In short, this partial disqualification is the kind of minimal response that would have been appropriate for a minor and unintentional violation of the Code of Judicial Conduct.

The court of appeals' attempt to justify this tepid response by parsing the chronology of the several *known* violations of the Code of Conduct to demonstrate that they primarily affected the remedy phase of the litigation provides the public with cold comfort, especially where the court of appeals squarely held that the violations "seriously tainted the proceedings before the District Court and called into question the integrity of the judicial process." 253 F.3d at 46. The only way that such a "taint" can be effectively removed in a manner that will "best serve" Congress's command and the public interest is the imposition of a full retroactive disqualification.

We are told, however, that full retroactive disqualification "would unduly penalize plaintiffs, who were innocent and unaware of the misconduct, and would have only slight marginal deterrent effect." 253 F.3d at 116. However, in every case of retroactive disqualification, there will always be a party that would be penalized. Significantly, the court of appeals failed to consider the effect of its limited disqualification on Microsoft, the target of the trial court's repeated

derogatory comments. The court of appeals admitted that the "District Judge's conduct destroyed the appearance of impartiality," but believed that Microsoft's right to an impartial adjudication was not impaired because of the alleged absence of actual bias or prejudice. *Id.*

As the United States recognized in its Opposition, the court of appeals "treated the [alleged] absence of actual bias as a factor in guiding its discretion in choosing an appropriate remedy for the district judge's misconduct." U.S. Opp. 17. Accordingly, in the final analysis, the court of appeals' fundamental error was its failure to exercise its discretion in a fully informed manner when it failed to recognize obvious evidence of actual bias in fashioning its remedy. But even if the Judge's comments do not technically constitute actual bias, the flagrant ethical breaches nevertheless warrant full disqualification.

CONCLUSION

For the foregoing reasons and those presented by Microsoft, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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